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Supreme Court, U.S.
F I L E D

No. 991467

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in the

Supreme Court

of the

United States

October Term 1999

AARON BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Kevin M. Schad
6310 East Kemper Road
Suite 125
Cincinnati, OH 45241
(513) 489-8990

Counsel for Petitioner

52 pp

QUESTION PRESENTED

I.

Whether the Petitioner was entitled to effective representation during a plea offer when the Petitioner ultimately rejected the plea, and proceeded to trial.

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The Petitioner, Aaron Brown, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of

Appeals for the Sixth Circuit, entered in the above-entitled proceeding on December 2, 1999.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported (Case No. 98-1764) That determination is attached hereto in Appendix 1. The Petitioner's 28 U.S.C. § 2255 motion was initially denied by the United States District Court for the Eastern District of Michigan. That decision is attached hereto as Appendix 2.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 2, 1999. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; that have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence*.

STATEMENT OF THE CASE

The Petitioner, Aaron Brown, was originally indicted in a superceding indictment on three counts: conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846; distribution of cocaine, in violation of 21 U.S.C. § 841(a); and

unlawful use of a communications facility to further a drug trafficking offense, in violation of 21 U.S.C. § 843.

The Petitioner proceeded to trial with counsel Juan Mateo on January 9, 1991, and was convicted of the conspiracy count and the § 843 count. On December 3, 1991, the Petitioner was sentenced to 211 months incarceration.

The Petitioner appealed his conviction and sentence to the Sixth Circuit (Case No. 91-403), however, this appeal was denied in its entirety on March 3, 1994.

Subsequently, the Petitioner, with new counsel, filed a motion in the district court pursuant to 28 U.S.C. § 2255, raising the following issues:

I. Whether counsel was ineffective in his advice to the Petitioner regarding a guilty plea

II. Whether counsel was ineffective for failing to object to an improper jury instruction

III. Whether newly developed caselaw required reconsideration of the Petitioner's § 2D1.1 enhancement

IV. Whether an evidentiary hearing was warranted

After a review of the pleadings, the district court ordered an evidentiary hearing, which was held on December 10, 1997. Subsequently, on June 17, 1998, the court entered an order denying the § 2255 motion in its entirety. (Appendix 2)

The Petitioner appealed this matter to the Sixth Circuit (Case No. 98-1764). On December 2, 1999, the Court issued a decision denying the appeal, finding that counsel had not provided ineffective assistance during the plea process. (Appendix 1)

REASONS FOR GRANTING THE WRIT

The Petitioner submits that his Sixth Amendment right to effective assistance of counsel has been violated. The Petitioner received erroneous advice regarding the effect of pleading guilty versus going to trial, and based his decision on that

faulty advice. The Petitioner contends that a claim exists for ineffective assistance of counsel where counsel provides erroneous advice which results in a decision to go to trial.

ARGUMENT

1. The Petitioner was entitled to the effective assistance of counsel in determining whether or not to accept a plea offer

The Petitioner submits that he was entitled to the effective assistance of counsel during the time he was deciding whether or not to accept the United States' plea offer, and that counsel's ineffective representation resulted in a faulty decision to go to trial.

a. The right to effective assistance of counsel

This Court has held that a counsel can be found ineffective for giving advice which leads to an involuntary guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985) In that case, the Court held that in order to prove ineffective assistance of counsel in that context, the defendant had to prove: (1) that counsel's errors were below a standard of reasonable competence, and (2)

that but for those errors, the defendant would not have plead guilty, but would have instead proceeded to trial.

In the present case, an opposite set of circumstances have occurred. Counsel gave erroneous advice to the Petitioner as to the sentence he could receive by going to trial. The Petitioner made a decision to reject the plea offer, based on this advice, and proceed to trial. The Petitioner lost at trial, and received a sentence far greater than that predicted by counsel.

Many of the Circuit courts have determined that a defendant has the right to effective representation in obtaining advice which leads to the rejection of a plea agreement. In the case of *Boria v. Keane*, 99 F.3d 492 (2nd C. 1996), the Second Circuit held that counsel's failure to advise a defendant of the merits of accepting or rejecting a plea amounted to ineffective assistance of counsel. In that

case, the defendant was offered a plea, and counsel did not discuss the merits of the plea at all with the client, but merely discussed trial strategy and rejected the offer. This resulted in a superceding indictment, and a much longer sentence. The Second Circuit held that such conduct was ineffective, and was prejudicial, in that the defendant would have, if informed of the alternatives, taken a plea. *Id.* at 497

Further, in the case of *Jones v. United States*, 178 F.3d 790 (6th C. 1999), the Sixth Circuit held that a claim of ineffective representation could lie where the defendant made a determination to proceed to trial instead of pleading guilty based upon counsel's erroneous advice. *Id.* at 795

Not all circuits have held that a defendant can have a cause of action to address this particular issue. In addition, this Court has never addressed

the issue of whether an ineffective assistance of counsel claim is viable for this type of scenario. Further, since the defendant in a given case proceeds to trial, there is an issue as to what kind of relief can be granted. Therefore, certiorari is appropriate on this matter.

b. The Petitioner received ineffective assistance in this particular case

The Petitioner submits that the facts in this case prove that counsel provided ineffective representation which led to the Petitioner making an erroneous decision to proceed to trial.

In the present case, an evidentiary hearing was held on the issue of counsel's representations to the Petitioner. The Petitioner, his mother, and his wife all testified that the Petitioner's prior attorney had told them that if the Petitioner went to trial and lost, he would receive a sentence of no more than 151 months. It was undisputed that the

Petitioner had been offered a plea agreement whereby the sentence would be capped at 10 years. The Petitioner also presented the court with a letter from counsel, written prior to trial, which supported this allegation. In that letter, counsel talked about a capped 10 year sentence by taking the plea, and informed the Petitioner "if you go to trial and they can establish you were responsible for 25 kilos of cocaine, your sentencing guideline range would be 121-151 months, and you would not be given any credit for acceptance of responsibility."

The Court of Appeals determined that the Petitioner could not prove prejudice. The Court found that the Petitioner would have proceeded to trial, regardless of the advice given to him by counsel. However, this finding is belied by the testimony of the Petitioner, his mother, and his wife, who all consistently testified at the evidentiary hearing that he would have

plead guilty, if he knew he was facing such a significant sentence. It is clear that the advice his counsel gave him made going to trial and taking a plea no different: any defendant in a similar situation, when faced with the same sentence by pleading guilty or going to trial, would attempt to take the chance of acquittal. To say that counsel's erroneous advice had no effect is to dispense with reality. The Petitioner submits that the record proves prejudice, warranting relief from conviction in this case.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

Kevin M. Schad
Attorney for Petitioner
Schad, Buda, Cook, L.L.C
6310 E. Kemper Rd.
Suite 125
Cincinnati OH 45241

APPENDIX

1. COURT OF APPEALS DECISION
   DECEMBER 2, 1999

2. DISTRICT COURT DECISION
   JUNE 17, 1998

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

NO. 98-1764

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AARON BROWN, *Petitioner-A appellant,*

v

UNITED STATES OF AMERICA, *Respondent-A appellee.*

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FILED
DEC 2 1999

LEONARD GREEN, Clerk

On Appeal from the United States District Court for the Eastern District of Michigan

Before: BOGGS and GUY, Circuit Judges; HOOD, District Judge

PER CURIAM. Aaron Brown appeals the district court's decision denying federal post-conviction relief under 28 U.S.C. § 2255. For the reasons given below, we affirm the decision of the district court.

Brown is currently serving a 211-month sentence as a result of his conviction on January 9,1991 of conspiracy to distribute cocaine, 21 U.S.C. § 846, and unlawful use of a communications facility to further a drug trafficking offense, 21 U.S.C. § 843. Brown's conviction was affirmed on direct appeal, and an unsuccessful Rule 33 motion followed. Securing new counsel, Brown then pursued relief under 28 U.S.C. § 2255.

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The district court conducted an evidentiary hearing on December 10,1997. The focus of the hearing was to determine whether, prior to trial, Brown was given incorrect advice as to the applicable sentencing guidelines range for the charges he was facing. The district court found that Brown failed to present contemporaneous evidence as to his intent to plead guilty and his allegations were merely self-serving.[1] The district court then denied relief, and this appeal timely followed.

Brown raises two issues, both of which involve ineffective assistance of counsel. Said issues are to be reviewed *de novo* by this Court. See *Watkins V. Kassulke,* 90 F.3d 138,143 (6th Cir. 1996). The following standard will be applied to Brown's claims: (1) whether counsel's performance was deficient in a manner so serious "that counsel was not functioning as 'counsel' as guaranteed by the Sixth Amendment"; and (2) whether the defense was prejudiced because

counsel committed errors so serious that Brown was deprived of a fair trial with reliable results. *Strickland V. Washington,* 466 U.S. 668, 687 (1984); *see also Hill v. Lockhart,* 474 U.S. 52, 57 (1985).

Brown's claim involving erroneous advice of counsel in the plea negotiation process requires him to show that his counsel's performance was deficient, and that the deficient performance caused him to reach a different decision regarding his plea. *Nagi V. United States,* 90 F.3d 130,135(6th Cir. 1996), *cert. denied,* 519 U.S. 1132(1997). In this case, the district court judge discredited Brown's testimony that erroneous advice of counsel

[1] Trial counsel testified that Brown wanted his day in court and that at no time did he want to plead guilty. However, at the original sentencing, counsel stated that Brown wanted to plead guilty, but the right deal could not be worked out.

regarding his potential sentencing guidelines resulted

in his decision to reject the government's proffered plea bargain and proceed to trial.

This Court has held that the district court is in "the best position to judge credibility." *United States V. Bradshaw,* 102 F.3d 204, 210 (6th Cir. 1996). The district court judge's findings after an evidentiary hearing demand great deference, "as only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson V. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

The district court's finding that Brown did not rely on counsel's advice when Brown exercised his right to a jury trial is entitled to great deference. It is clear to the Court, as it was to the district court, that Brown did not accept the 120-month sentence proposed by the government simply because he would

not admit to being involved in as much as 5 kilograms of cocaine. For these reasons, Brown is denied post-conviction relief on this issue as counsel's performance was in no manner deficient.

Brown next argues that his counsel was ineffective when he failed to object to an improper buyer-seller instruction, one which did not inform the jury that the sale of drugs for resale, rather than merely for personal consumption, could be insufficient to establish a conspiracy. He contends that such an instruction, if accepted by the jury as true, would exculpate him from the drug conspiracy.[2] The record indicates that his counsel did not object to the buyer-seller instruction rendered by the district court.

[2] A buyer-seller instruction would permit the jury to consider that the cocaine in Brown's possession was for his own personal consumption, and not for the purpose of sale in a drug conspiracy.

It is questionable whether Brown was entitled

to a buyer-seller instruction at all as the government produced evidence of the existence of multiple transactions of large quantities of cocaine, advanced planning of same, and Brown's involvement therein. In *United States V. Nesbitt,* 90 F.3d 164,167 (6th Cir. 1996), this Court held that such evidence shows that the parties are involved in a conspiracy, rather than just a buyer-seller relationship. Nevertheless, this Court findsthe jury was properly instructed in regard to the conspiracy charge and that his counsel was not deficient in failing to object to the instructions given by the district court.

Accordingly, we **AFFIRM** the district court's decision to deny post-conviction relief under 28 U.S.C. § 2255.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, CASE NO. 90-CR-80445-DT
HON. PATRICK J. DUGGAN

Plaintiff,

vs.

AARON E. BROWN,

Defendant.
_____/

A TRUE COPY
Clerk U.S. District Court
Eastern District of Michigan

OPINION

Currently before the Court is defendant Aaron E. Brown's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Section 2255 permits a court to grant relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." In this motion, defendant asserts that he received ineffective assistance of

counsel with respect to a plea offer and a jury instruction. He also asserts that a two level sentencing enhancement imposed by the Court relating to possession of firearms is incorrect.

presented by the parties. *See § 2255* ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall... grant a prompt hearing thereon.")

Background

On August 17, 1990, the government indicted defendant for taking part in a drug conspiracy. The members of this conspiracy distributed large quantities of cocaine over the course of several years. On February 8, 1991, a jury found defendant guilty of conspiracy to distribute and the distribution of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count Si). The jury also found defendant guilty of unlawfully using a communication facility in violation of 21 U.S.C. § 843 (Count 8). On December 3, 1991, the Court sentenced defendant to 211 months incarceration with

respect to Count Si and a concurrent period of incarceration of 48 months on Count 8.

Plea Bargain

Defendant contends that as a result of ineffective assistance of his trial counsel, he has been harmed because he was sentenced to 211 months, rather than the 120 months that he should have received.

On December 10, 1997, this Court conducted an evidentiary hearing with respect to this aspect of defendant's ineffective assistance of counsel claim.

The Court is satisfied, based on the information in the records and files of this Court and based on testimony presented at the evidentiary hearing, that prior to trial, the government was willing to enter into a plea agreement in which the government would agree that plaintiff's sentence would not exceed 120 months. This proposal was communicated to defendant by his attorney, Juan A. Mateo, in a letter dated December 28, 1990. (Evid. Ex.

101). In that letter, however, attorney Mateo incorrectly indicated to defendant that if he chose to go to trial, and if the government could prove that defendant was responsible for at least 25 kilos of cocaine, the sentencing guideline range would be 121-151 months. This was incorrect because if defendant was found to be responsible for 25 kilos of cocaine, his offense level would be 34 (absent any other adjustments). *See* U.S.S.G. § 2D1.1(c)(3). With a criminal history category of I, his guideline range would be 151-188 months. *Id.* at Ch. 5 Pt. A.

Defendant declined to enter a plea of guilty and after conviction was sentenced to 211 months. Defendant now contends that had he received proper advice (i.e., that if he declined to plead guilty and chose to go to trial, he could face a sentence greater than 151 months), he would have accepted the plea agreement. He contends that the failure of counsel to adequately represent him with respect to information needed to decide whether or not to accept a plea constitutes ineffective assistance of counsel for which

this Court should grant the relief he requests.[2]

[1]The letter of December 28, 1990 indicates that under the sentencing agreement, defendant would serve a "minimum" of 120 months. However, Mr. Mateo indicated that the 120 months was also intended to be the maximum he would serve.

In order to establish ineffective assistance of counsel, defendant must show "that counsel's performance was deficient .... [and] that the deficient performance prejudiced the defense." *Strickland v. Washington, 466* U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *accord O'Hara V. Wigginton,* 24 F.3d 823, 828 (6th Cir. 1994). In determining whether counsel's performance is deficient,

> The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690, 104 5. Ct. at 2066. A defendant's defense is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 5. Ct. at 2068. "In claiming ineffective assistance of counsel in the context of a guilty plea, [the defendant] must show that his counsel's performance was deficient and that the deficient performance caused [the defendant] to reach a different decision regarding his plea." *Nagi V. United States,* 90 F.3d 130, 135 (6th Cir. 1996), *cert. denied,* 117 S. Ct. 994, 136 L. Ed. 2d 875 (1997).

"[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer. Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty."

[2]Defendant requests that this Court impose a sentence of 120 months.Upon reviewing the pleadings submitted by the parties, the Court determined that an evidentiary hearing was necessary with respect to the plea offer issue. (Opinion

and Order of November 19, 1997.) The Court held the evidentiary hearing on December 10, 1997. The Court decides the remaining issues presented by defendant on the basis of the pleadings

United States V. Day, 969 F.2d 39, 43 (3rd Cir. 1992) (citations omitted). Moreover, "familiarity with the structure and basic content of the Guidelines... has become a necessity for counsel who seek to give effective representation." *Id.*

Defendant testified at the evidentiary hearing that not only did attorney Mateo represent to him in the letter of December 28, 1990 that the "maximum" he could get if he went to trial would be 151 months, but that throughout the discussions prior to trial, Mr. Mateo always "assured" him that the most he would get would be "twelve years." Mateo testified that because the conversations that he had with defendant took place more than seven years ago, it is impossible for him to recall exactly what was said in his meetings with defendant. Furthermore, at defendant's

request, he turned over his file to defendant's father in May 1996. Mateo does recall that he discussed with defendant the quantity of cocaine for which defendant believed he was responsible, and at no time does he recall defendant acknowledging that he was responsible for as much as 5 kilos of cocaine.

Mateo does not recall specifically discussing a potential sentence with defendant. However, he testified that defendant clearly communicated to him an unwillingness to plead guilty, at least an unwillingness to plead guilty under the terms of the agreement proposed by the government.

Defendant testified that after the Court sentenced him to 211 months, he asked Mateo

[3]Defendant's father was asked at the hearing by Kevin M. Schad, defendant's present counsel, what happened to the file he indicated it was lost when he

moved.

on more than one occasion how the Court could impose a sentence of 211 months when he was under the impression that the most he could get was 151 months. Mateo, on the other hand, testified that at no time did defendant ever raise with him the issue of the sentence imposed being greater than the 151 months, which Mateo allegedly assured him would be the maximum.

Defendant testified that he requested Mateo to continue to represent him in conjunction with the appeal and that he discussed with Mateo the issues that would be raised on appeal. At no time did Mateo indicate to him that he would present, as an appellate issue, the fact that the Court imposed a sentence greater than that which defendant was led to believe would be the maximum.[4]

Defendant also admits that he not only had conversations after sentencing, but he recalls that he wrote

to Mateo on occasion. However, he does not recall ever writing to Mateo and inquiring as to why his sentence exceeded the 151 month "maximum."[5]

While this Court believes that the letter of December 28, 1990 provided defendant

[4]The Court recognizes that this would be a difficult issue for Mateo to have raised on appeal, since it was not raised before the trial court. However, the fact that defendant now claims that he believes there was an "error" with respect to that sentence raises the question of why defendant did not bring his concern to the attention of Mateo. In other words, if defendant believed that the sentence was incorrect because it exceeded that which he had been "promised," why didn't he inquire of Mateo why that was not being presented as an appellate argument.

[5]Defendant did not indicate to the Court at the time of sentencing any surprise or shock at the sentence.

with incorrect information, and in and of itself could have "misled" defendant into believing that, if he went to trial, the maximum he would serve would be 151 months, this Court does not believe that Mateo's letter actually caused plaintiff to believe that he faced a maximum sentence of 151 months. Defendant's testimony on this subject is not credible.

Defendant testified that at the time of sentencing he believed that the maximum he could get would be 151 months. However, prior to sentencing, defendant reviewed with his attorney the presentence report that had been prepared. In the presentence report the probation officer calculated the guideline of imprisonment range to be *235* to 293 months. (Presentence Rept. ¶ 75). Prior to sentencing, the Court specifically inquired of defendant if he had reviewed the presentence report with his attorney and

pointed out to him the importance of the information in the report being correct. He indicated that he had reviewed it with his attorney and did not find anything in there that he believed to be incorrect.

Furthermore, there was extensive argument by Mr. Mateo and Assistant U.S. Attorney Robert Cares with respect to the quantity of drugs for which defendant should be responsible. Those arguments related to the appropriate guideline range. Clearly defendant was on notice that a sentence greater than 151 months was not only possible, but strongly being urged by the government. Defendant's representation to this Court that he was never aware prior to sentencing of his potential sentence is not believable and causes the Court to doubt defendant's testimony that Mateo repeatedly told him that his maximum sentence was 151 months.

Furthermore, Mateo testified that the first time he was aware of this issue was in 1997, and, other than defendant's testimony that he had discussed this with Mateo, there is nothing in the record to indicate that defendant raised this issue any time prior to 1997.

The Court believes that this issue of the "151 months maximum" only came to light when defendant "recently" (or someone on defendant's behalf) noted the letter of December 28, 1990 and its contents. It is difficult for this Court to believe that if defendant had truly believed that the maximum sentence that could be imposed was 151 months, that defendant would not have raised this issue in a written communication of some kind, before he filed the instant motion.

Accordingly, the Court does not believe that Mateo

failed to "reasonably inform" defendant on whether to accept the plea agreement, and defendant has failed to established that Mateo's assistance was constitutionally deficient.

The government also contends that defendant cannot satisfy the second prong of the *Strickland* test, i.e., that he was prejudiced by the alleged inadequate representation.

The government argues that it is clear that at no time was defendant willing to admit to being responsible for 5 kilograms of cocaine and such acknowledgment was essential to entering into an agreement with the government.[6] Mateo testified that defendant told him he

[6]Under the sentencing guidelines, 5 kilograms of cocaine yields a base offense level of 32. U.S.S.G. § 2D1.1(4). With a two point reduction for acceptance of responsibility, defendant would have had a total offense level 30. *Id.* § 3E1 .1(a). The guidelines provide for a sentencing range of 97-121 months for an offense level of 30. *Id.* Ch. 5 Pt. A.

was responsible for 3 and a half kilos of cocaine. Furthermore, defendant's sentencing memorandum indicated that,

> We have informed the probation officer that, in fact, Mr. Brown indicated that he delivered approximately seven, one-half, kilograms of cocaine on June 26,1989. In other words, 500 kilograms [sic] of cocaine times seven would be 3- ½ of kilograms of cocaine, and not 7-1/2 kilograms of cocaine.

(Sentencing Mem. at 11-12.)

The memorandum stated further,

> Throughout the pretrial stages of this case, defendant Brown made it very clear to this counsel that he was more

> than willing to enter into a negotiated plea arrangement where he could admit to his responsibility in this conspiracy and nothing more. This writer believes that the only reason defendant Brown was unable to plead guilty to any count in this case was because the government continued to insist that he was a "major player" and was responsible for more cocaine than he was willing to admit being involved with.

Id. at 13. Defendant's supplemental sentencing memorandum indicated,

> According to Mr. Brown's version he delivered less than five kilograms of cocaine during the date of June 26, 1989. His guidelines should be calculated as follows: Less than five kilograms of cocaine would bring him to a level 30. Because of his limited involvement and his candid disclosure to probation, he should be awarded the two levels for acceptance of responsibility, which would bring him down to level 28.

(Supplemental Sentencing Mem. at 3.) At the sentencing hearing, Mateo argued that, according to defendant's recollection, defendant was responsible for 3 and a half kilos. (Sentencing Trans. at 7, Def's Ex. H.) Mateo also stated:

I also made an objection. There was a dispute between myself and the probation officer regarding Mr. Brown's version of the offense. When he refers to approximately seven and a half kilos of cocaine, he is talking seven
one-half kilos of cocaine and not seven and a half kilos. If the Court can understand the difference.

And Mr. Brown --so that would bring it under five kilograms of cocaine. (Sentencing Trans. at 46.)

If defendant would not acknowledge that he was responsible for at least five kilograms of cocaine, the guideline range would not have allowed for a sentence greater than 97 months.[7] The maximum of 97 months was not what the government was willing to accept and the 120-month sentence was not acceptable to the defendant. As Mr. Mateo stated at the sentencing hearing: "He was more than willing before trial to accept and negotiate a plea arrangement. We could not do so because of the problem that we have today. We couldn't agree on

the amounts." *Id.* at 47.

Defendant's refusal to acknowledge responsibility for at least five kilograms of cocaine prevented the parties from entering into a plea agreement.

Defendant also testified at the evidentiary hearing on December 10, 1997, that if his maximum sentencing exposure had been 13 years, rather than 151 months, it was very likely he would have accepted the plea agreement for 10 years of incarceration. In other words,

[7]If the quantity involved is between 3.5 kg and 5 kg of cocaine, the base offense level is 30. With a two-level reduction for acceptance of responsibility, defendant's guideline range would have been 78-97 months.

[8]The 151 months maximum equates to 12 years and 7 months. According to defendant, 151 months is what he believed to be the maximum amount of jail time he could receive if he went to trial.

according to defendant, he would not have risked going to trial if the maximum he could have received would have been 13 years *(156* months), but he would have, and in fact did, risk going to trial when he believed that the maximum sentence would be 151 months.

The Court concludes that defendant's assertion that he would have accepted the deal had he known that his potential sentencing exposure was greater than 151 months is not convincing. Defendant's willingness to accept the deal is belied by the fact that he did not express an interest in accepting responsibility for 5 kilograms of cocaine. He consistently indicated that he was responsible for only 3.5 kilograms. ~Furthermore, defendant's testimony is brought into question by his testimony indicating that had his sentencing exposure been 13 years *(156* months), rather than 151 months, he would have accepted the plea agreement. The Court does not believe that a five month difference in sentencing exposure would have changed defendant's mind

regarding the 10 year offer made by the government. It is simply too small of a difference. Based on this evidence, the Court finds that defendant was not prejudiced by Mateo's performance as defendant's attorney.

Jury Instruction

Defendant next argues that his attorney's assistance was ineffective because he failed to object to a jury instruction that "negated" defendant's only defense (i.e., that defendant was not a member of the drug conspiracy, but merely a supplier of drugs to Roosevelt Lockett, who in turn used the drugs in furtherance of the conspiracy). Defendant argues that the following jury instruction was objectionable,

> Mere proof of the existence of a buyer-seller relationship is not sufficient to convict one as a co-conspirator on drug conspiracy charges. By this I mean a person who buys drugs solely for his or her personal consumption, no matter how many times, is not a member of a conspiracy to distribute controlled substances.

(Trial Trans. Vol.14 at *25*, Def. Ex. G.) Defendant argues

that this instruction is erroneous because it did not inform the jury that the sale of drugs for resale, rather than merely for personal consumption, could be insufficient to establish a conspiracy.

Jury instructions are sufficient if they "fairly and adequately submit[] the issues and applicable law to the jury." *United States V. Martin,* 740 F.2d *1352,* 1361(6th Cir. 1984). An instruction will be upheld if it has a permissible meaning in the context of its surrounding instructions. *United States* v. *Buckley,* 934 F.2d 84, 87 (6th Cir. 1991). Defendant cites *United States* v. *Mims,* 92 F.3d 461(7th Cir. 1996) in support of his argument. In *Mims,* the Seventh Circuit found that a district court had committed plain error in instructing the jury with respect to a buyer-seller relationship in a conspiracy case. The *Mims* court faulted the district court for failing to emphasize the agreement element of the crime of conspiracy. In addition, the instruction in that case stated that a person who buys drugs for resale from a conspirator "is a

member of the conspiracy if he knows at least its general aims."[9]

Id. at *465*.

[9]The Court notes that the trial court in *Mims* did give an instruction similar to the instruction that defendant finds offensive in the instant case: "Proof that a defendant merely purchased drugs for personal consumption, without more, is insufficient to prove that defendant is a member of the conspiracy." *Jd.* at 465. However, the Seventh Circuit did not fault the trial court for giving this instruction. Rather, the *Mims* court stated that the instructions as a whole failed to inform the jury of the importance of finding an agreement and faulted the trial court for instructing the jury that a conspiracy necessarily exists where a purchase is made for the purpose of resale. The *Mims* court concluded that the "effect of the buyer-seller instruction was therefore to direct the jury to convict Mims and McDade for conspiracy solely on the basis of a purchase for resale, without requiring a finding of an agreement beyond the mere purchase." *Id.* at 465.

The *Mims* court emphasized that the instruction given by the trial judge "allowed the jury to make a finding of guilt without determining whether the government had proved the existence of any greater conspiratorial agreement." *Id.* at 466.

In the Court's view, *Mims* is distinguishable from the instant case. In this case, the Court gave detailed instructions concerning the agreement element. For example, the Court read the following instructions to the jury: 1) the elements of conspiracy include an agreement to commit a crime, 2) the government had to prove that

the defendant arrived at an agreement or understanding to break the law, 3) proof of a conscious agreement should be central to the jury's consideration of the conspiracy charge, 4) proof of negotiations alone is insufficient to find a conspiracy, 5) the jury must consider each defendant separately to determine whether he or she knew of the conspiracy's main purpose and voluntarily joined it to help advance the conspiracy's goals, and 6) mere knowledge was insufficient to establish membership in a conspiracy, but the government had to prove that the defendant joined the conspiracy with the intent to advance or achieve its goals. (Trial Tans. Vol.14 at 22-25.) Moreover, the Court did not give an instruction, as did the trial court in *Mims,* indicating that the jury was required to find a conspiracy if the defendant knew the conspiracy's general aims. As such, *Mims* is distinguishable, and the Court is satisfied that the jury was properly instructed with respect to the conspiracy charge. *See United States V. Hamell,* 931 F.2d 466, 470 (8th Cir. 1991) (stating that it was not necessary for trial court to give a separate buyer-seller instruction because the detailed conspiracy instructions adequately stated the law).

Because the instructions were sufficient in this case, defendant has not shown that Mr. Mateo's assistance was constitutionally deficient or that defendant was prejudiced by Mateo's conduct with respect to the jury instructions.

Sentencing Enhancement

Defendant received a two point enhancement in his total offense level pursuant to U.S.S.G.§ 2D1.l(b)(1) for possessing weapons during the conspiracy.[10] These weapons included a 9 mm handgun, a loaded Mossberg assault shotgun, a carbine, an Enfield MP-45 semi-automatic pistol, a revolver, ammunition, and a bullet proof vest. Defendant argues that the enhancement is invalid under *United States V. Bailey, 516* U.S. 137, 116 S. Ct. *501,* 133 L. Ed. 2d 472 (1995) because it was imposed under a "fortress" theory, i.e., the enhancement was imposed because defendant possessed the weapons in order to protect his drug operations. In *Bailey,* the Supreme Court held that the word "use" under 18 U.S.C. §924(c)(1)'[1] required "active employment" of a firearm, not mere

possession. 116 S. Ct. at 508-09; *see also United States V. Bingham*, 81 F.3d 617, 623-24 (6th Cir. 1996), *cert. denied*, 117 5. Ct. 136 L. Ed 2d 177 (1996). Defendant argues that the fortress theory must also be rejected in the context of a sentencing enhancement pursuant to U.S.S.G. § 2D1.1(b)(1).

[10]U.S.S.G. § 2D1.1(b)(1) states, "If a dangerous weapon (including a firearm) was possessed, increase by 2 levels."

[11]Section 924(c)(1) states in pertinent part, "Whoever, during and in relation to any crime of violence or drug trafficking crime... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.

Defendant's argument was rejected in *United States* v.*Elder*, 90 F.3d 1110, 1133 (6th Cir. 1996), *cert. denied*, 177 5. Ct. *529*, 136 L. Ed. 2d 415(1996), in which the Court held that "The

Supreme Court took great pains in *Bailey* to limit its holding to conviction under 18 U.S.C. § 924(c)(1), and specifically indicated its holding did not apply to guideline enhancements for weapons possession." The *Elder* court went on to hold that an enhancement was appropriate in that case because there was evidence that the defendant kept weapons in an apartment where drugs and drug proceeds were stored. In the instant case, the governrnent found the weapons along with a scale containing cocaine and heroin residue in defendant's residence. The Sixth Circuit has already held that these facts are sufficient to justify~ imposition of the § 2D 1.1 (b)(1) enhancement in the instant case, *see United States V. White,* 1994 W.L. 70855*14 (6th Cir. 1994), and as the Sixth Circuit made clear in *Elder,* the *Bailey* decision does not affect sentencing in the instant case.

For these reasons, the Court rejects defendant's arguments on this issue.

Conclusion

For the reasons set forth above, defendant's motion to vacate, set aside, or correct his sentence is denied. An Order consistent with this Opinion shall issue forthwith.

PATRICK DUGGAN
PATRICK J. DUGGAN
UNITED STATES DISTRICT COURT

JUN 17 1998

Copies to:

Kevin M. Schad, Esq.
Robert Cares, A.U.S.A.